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# AN INTRODUCTION TO THE NORTH DAKOTA RULES OF CRIMINAL PROCEDURE

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## I. BACKGROUND

The North Dakota Judicial Council, in June, 1967,<sup>1</sup> established a working committee to examine, evaluate, and update the criminal procedure in effect under statutory enactment.<sup>2</sup> The purpose of the committee was not merely to update Title 29 of the North Dakota Century Code (Judicial Procedure, Criminal) by statutory amendment, but rather to establish a body of rules<sup>3</sup> which would reflect the numerous changes in procedural due process brought about by the recent mandates of the United States Supreme Court as well as other innovations in the area of criminal law and procedure.

The Committee as originally established consisted of six members; two<sup>4</sup> appointed by the Chief Justice and three<sup>5</sup> appointed by the president of the State Bar Association. North Dakota Supreme Court Justice Ralph J. Erickstad was appointed Chairman. The Committee, designated the Joint Committee of the Judicial Council and State Bar Association for the Adoption of Rules of Criminal Procedure, held its first meeting in September, 1967. Additional members were added to the Committee to provide the necessary balance as

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1. Minutes of the North Dakota Judicial Council, June 1967.

2. N.D. CENT. CODE Tit. 29 (1960).

3. The Supreme Court of North Dakota is empowered to make "... all rules of pleading, practice, and procedure which it may deem necessary for:

1. The administration of justice in all civil and criminal actions, remedies, and proceedings in any and all courts of this state; ..."

N.D. CENT. CODE § 27-02-08 (1960).

4. Retired Supreme Court Justice James Morris and District Judge Eugene Burdick.

5. Gerald G. Glaser, The Honorable William S. Murray, Mr. Robert Vogel.

well as the depth and breadth of experience necessary for such an undertaking.<sup>6</sup>

The Federal Rules of Criminal Procedure served as the working model for the North Dakota Rules of Criminal Procedure. The decision to use the Federal Rules as a model resulted from a number of considerations. They are an established and workable body of Rules which have been subject to judicial interpretation over the years and have periodically been amended as judicially necessary to preserve their viability. Since the precedent for developing uniformity with federal practice and procedure had been established by the successful adoption of the North Dakota Rules of Civil Procedure, and more recently the adoption of the North Dakota Rules of Appellate Procedure, the logical selection was to follow the Federal Criminal Procedure. This decision is especially important in light of the due process requirements established by the United States Supreme Court in the last twenty years. Constitutional interpretation of the Fourth Amendment in the areas of search and seizure, probable cause, and informants; Fifth Amendment interpretations of self-incrimination; Sixth Amendment problems in the areas of confrontation, right to counsel, indigency, speedy trial, and right to trial by jury, all have a direct and immediate impact on criminal procedure at both the federal and state levels.

In addition to the Federal Rules of Criminal Procedure, the Committee studied and considered the recently adopted rules of criminal procedure of other states<sup>7</sup> as well as the established American Law Institute Model Code of Pre-Arrest Procedure, the Rules of Criminal Procedure drafted by the National Conference of Commissioners on Uniform State Laws (1952) and the work of the American Bar Association on the Standards for Criminal Justice.

A difficult threshold issue was a determination of the scope of the Rules and their applicability to the various state courts. The difficulty was highlighted by the approach taken in drafting the North Dakota Rules of Civil Procedure. Those rules apply to the district courts; the North Dakota Rules of Appellate Procedure govern appeals from the district courts and county courts with increased jurisdiction. In view of that approach, and the fact that the Federal Rules of Criminal Procedure are directed to the Federal District Courts, it follows logically that the North Dakota Rules of Criminal Procedure should be directed to the district courts. Such an approach would have lessened the difficulty in drafting the criminal rules but would have ignored the lower state courts wherein a sub-

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6. In alphabetical order: John Graham, Esquire, The Honorable Roy A. Ilvedson, The Honorable Norbert J. Muggli, The Honorable Harry J. Pearce, Roger Persinger, Esquire, Paul Sand, Esquire, John Shaft, Esquire, and The Honorable Kirk Smith.

7. Alaska, California, Colorado, Florida, Idaho and New Jersey.

stantial amount of the criminal load is handled. However, applying the criminal rules to lower state courts created problems. The most controversial one was the applicability of the Criminal Rules to the municipal courts. To include the municipal courts within the scope of the criminal rules necessitated the acceptance of the notion that criminal due process is a constitutional requirement which must be afforded any individual in jeopardy of losing life or liberty as a result of governmental action even though the offensive omission or commission is not deemed to be criminal conduct within the framework of state statutes. This notion, however, flies in the face of the common law principle that punishment for violations of municipal ordinances should be treated in the manner of civil actions<sup>8</sup> because they are not deemed to be violative of a public law—hence not a crime. Only those ordinances which prohibit conduct likewise barred by state law as against the public welfare, involving the possibility of imprisonment as an incident to punishment, are deemed to be criminal in nature; therefore criminal procedure will apply.<sup>9</sup>

Another problem in considering whether the municipal courts should be included within the scope of the Rules was the lack of legal knowledge and training of most of the municipal judges throughout the state. For instance, the issuance of search and arrest warrants by magistrates untrained in the law could prove to be disastrous. The Committee eventually included municipal courts within the scope of the Rules, even though such a decision added considerably to the time and burden of drafting necessary to insure that the proper safeguards were incorporated within the body of the Rules. This approach reflects the idea that procedural due process is a necessary prerequisite to placing an individual in jeopardy of losing life or liberty as a result of governmental action.

The drafting effort provided an additional dilemma—how to handle those procedures which must necessarily be included within the Rules but which lie in that grey area between the substantive (a legislative function) and the procedural (a proper function of the Committee). The Committee decided it would propose legislation wherever necessary to affect those issues clearly substantive. When such an approach was deemed impossible or impractical the Committee took positive action on the issue as a necessary and proper exercise of their function as drafters of the Rules of Criminal Procedure.

In November, 1971, the Committee completed its initial draft of the Rules. The draft provided merely a framework for the final product. Developments had taken place in the area of criminal law

8. *Village of Litchville v. Hanson*, 19 N.D. 672, 674, 124 N.W. 1419, 1120 (1910).

9. *City of Minot v. Whitfield*, 71 N.W.2d 766 (N.D. 1955).

and procedure and many decisions had been handed down by the United States Supreme Court in the four years since the Rules had first been considered by the Committee. Extensive research was required to bring the Rules up to date with recent case developments. Existing state law<sup>10</sup> had to be annotated to determine the disposition of each statute in relation to the various Rules. Proposed amendments to the Federal Rules of Criminal Procedure<sup>11</sup> were studied to determine their applicability. At the time these amendments were studied, they were merely proposals before the United States Supreme Court.

Action by the Committee in final adoption of the Rules included a consideration of each Rule together with recommended amendments, statutes affected by and affecting each Rule, and the explanatory note prepared for each Rule.

## II. EXPLANATORY NOTE

An explanatory note is provided for each Rule except Rule 60. They are intended to explain what is contained in each Rule; the origin and development of the Rule; the interpretation and usage given to the Rule under federal and state practice; the Committee action on the Rule; and an indication of how the new Rule alters or modifies existing practice. The text of each note is prepared from the minutes of the Committee meetings, research of the applicable cases, notes of the advisory committee of Federal Rules of Criminal Procedure, and material gathered from the various treatises on the Federal Rules of Criminal Procedure.<sup>12</sup> In some instances the explanatory note is necessarily lengthy. In drafting the note it was recognized that many practitioners are not familiar with the Federal Rules nor do they have access to the treatises on the subject, therefore as much useful information was included as practicable.

Cross-references to other Criminal and Civil Rules are included wherever appropriate. Criteria for the cross-references turned on the applicable part or parts of the Rule referred to and a determination of where the practitioners' attention should be directed. State and federal decision are cited to provide a broader interpretation of the rules.

A determination of how various statutes were affected by the rules was another problem in drafting. Under the laws of the State of North Dakota,<sup>13</sup>

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10. N.D. CENT. CODE TITS. 12, 27, 29, 33, 40 (1960).

11. 48 F.R.D. 553 (1970); 52 F.R.D. 409 (1971).

12. Federal Criminal Code, Uniform Commercial Code, ALI Model Code of Prearrestment Procedure (Official Draft No. 1, 1972).

13. N.D. CENT. CODE § 27-02-09 (1960).

[a]ll statutes relating to pleadings, practice, and procedure in civil or criminal actions, remedies, or proceedings, enacted by the legislative assembly, shall have force and effect only as rules of court and shall remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court.

Therefore any rule of practice or procedure promulgated by the Supreme Court in accordance with North Dakota law<sup>14</sup> has the force and effect of law. This made a study necessary to determine which were the affected statutes and how the Committee would resolve the conflict. Statutes which were deemed applicable or "affected" were divided into two general classifications; those "Superseded" and those "Considered." A superseded rule is one contradictory to or in conflict with the Rule, or is redundant and does nothing more than restate the Rule. A statute "considered" is one which contains material useful in circumscribing and framing the import of what the Rule is intended to convey without burdening the Rule with unnecessary length and complexity.

In determining the disposition of the individual statutes the dilemma of the substantive vs. the procedural again arose. Since the Supreme Court is limited by law from promulgating any rule which "shall abridge, enlarge, or modify in any manner the substantive rights of any litigant,"<sup>15</sup> the determination again became a matter of judgment by the Committee.

### III. ORGANIZATION OF THE RULES

The North Dakota Rules of Criminal Procedure follow the format of the Federal Rules of Criminal Procedure with a few modifications. The North Dakota Rules are organized under ten subtitles in the order and sequence of the criminal proceeding.

A complete analysis of all the Rules is impossible in the space allotted in this article. Since the explanatory notes have been designed for that objective, this article portrays the background and development of the Rules and discusses its organization. Also included is a brief description of each Rule, and some of the more significant departures from current North Dakota practice and procedure.

#### A. SCOPE, PURPOSE AND CONSTRUCTION

Under this subtitle of the North Dakota Rules of Criminal Procedure are found the primary Rules which form the framework and direction for the body of the Rules.

14. N.D. CENT. CODE § 27-02-11 to -14 (1960).

15. N.D. CENT. CODE § 27-02-10 (1960).

### Rule 1. Scope.

This Rule establishes the framework of the Rules and is the first major departure from both the Federal Rules of Criminal Procedure and current North Dakota practice. The Rule provides,

[e]xcept as otherwise provided by statute and in Rule 54, these Rules govern the practice and procedure in all criminal proceedings in the district courts and, so far as applicable, in all other courts, including prosecutions for violations of municipal ordinances.

The major difference between this Rule and the Federal Rule is that the Federal Rules speak to the Federal District courts exclusively while the North Dakota Rules are directed to all the courts of the state including the municipal courts.

In addition to issues raised by the broad scope of these Rules, further problems were created with respect to appeals from the lower courts not handled in the North Dakota Rules of Appellate Procedure, which apply to appeals from the district courts and county courts with increased jurisdiction only. This issue will be handled in a discussion of Rule 37.

### Rule 2. Purpose and Construction.

This Rule expresses the spirit in which the Rules will be applied—not ritualistically, but with flexibility,

to provide for a just determination of every criminal action or proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

## B PRELIMINARY PROCEEDINGS

This subtitle is concerned with the preliminary proceedings in the criminal process from the complaint to the preliminary examination.

### Rule 3. Complaint.

This Rule deals with the complaint, the basic charging document in the criminal process, and its consequences. In setting out the basic requirements for the issuance of a complaint, the Rule contains no significant deviations from existing practice. It is more specific than the Federal Rule in that it requires the statements of witnesses other than the complainant to be sworn to and reduced to writing, while reserving in the magistrate the right to question the complainant. The Rule also permits liberal amendment of the com-

plaint at any time before the finding or verdict if no additional or different offense is charged, and if the defendant's substantial rights are not prejudiced.

#### Rule 4. Arrest Warrant or Summons Upon Complaint.

This Rule requires that the magistrate establish a basis of probable cause before issuing a warrant of arrest. Such a finding may be based upon evidence

which may be hearsay in whole or in part provided there is a substantial basis for believing the source of the hearsay to be credible and believing that there is a factual basis for the information furnished.

Subdivision (a) of the Rule encourages the issuance of a summons instead of a warrant "if the magistrate has reason to believe that the defendant will appear in response to it. . . ." This provision recognizes occasions where it is not in the best interests of the defendant that he be subjected to formal arrest procedures, including booking and bail. This approach also alleviates the need for expending law enforcement resources when there is a substantial assurance that defendant will appear in court for trial.

#### Rule 5. Initial Appearance Before the Magistrate.

This Rule requires that every arrested defendant be brought before a magistrate without unreasonable delay. The initial appearance requirement is intended to insure that the defendant has been informed of the charge against him and that he has been advised of his rights in accordance with *Miranda v. Arizona*.<sup>16</sup> Subdivisions (b) and (c) of the Rule set out the list of rights of which the magistrate is required to inform the defendant that he is entitled.

##### Rule 5.1. Preliminary Examination.

This Rule is a spin-off of the procedure which has been incorporated in Rule 5 of the Federal Rules regulating the conduct of the preliminary examination before the magistrate. The function of the examination is to determine whether there is sufficient probable cause to hold the accused for further action. The Rule requires that the defendant be discharged if there is insufficient evidence for a finding of probable cause, but permits the prosecuting attorney to submit the findings of the magistrate to the district court for review.

#### C. INDICTMENT AND INFORMATION

The Rules contained in this subtitle provide the remaining two

16. 384 U.S. 436 (1966).



procedural devices by which a person may be charged with the commission of a criminal offense. In a major departure, Rule 6, which is the Grand Jury Rule under the Federal Rules of Criminal Procedure, is excluded from the North Dakota Rules. The reason the Committee chose not to address the question of grand juries is explained in the note that

[t]he Committee doubts whether any changes in statutory grand jury procedure can be made . . . in view of Section 8 of the North Dakota Constitution which provides that "the legislature" may change, regulate or abolish the Grand Jury system.

The complete revision of the Grand Jury Statutes in 1971<sup>17</sup> was at the urging of the Criminal Rules Committee, and was drafted by several of its members.

#### Rule 7. Indictment and Information.

This Rule establishes the form and required contents of the indictment and information as charging documents. Subsection (b) of the Federal Rules dealing with waiver of indictment was intentionally omitted from the North Dakota Rules because the North Dakota Constitution permits the state legislature to determine how an individual will be proceeded against when charged with a felony. The legislature has determined that the procedure may be by information.<sup>18</sup> Subdivision (d) provides that unnecessary allegations in the indictment or information may be disregarded as surplusage. Additionally, the Rule contains a liberal amendment provision; it permits amendment of the indictment or information any time prior to the verdict or finding so long as additional or different offenses are not charged or substantial rights of the defendant are not prejudiced. The final portion of the Rule requires the endorsement of the names of witnesses upon whose testimony the charging instrument is based.<sup>19</sup> This practice departs from the Federal Rules which contain no such provision.

#### Rule 8. Joinder of Offenses and Defendants.

This Rule is divided into two parts. The first part deals with joinder of offenses and permits such joinders if the offenses charged

are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

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17. N.D. CENT. CODE Ch. 29-10.1 (Supp. 1973).

18. N.D. CENT. CODE Ch. 29-11 (1960).

19. *State v. Manning*, 134 N.W.2d 91 (N.D. 1965).

The second section of the Rule concerns the joinder of defendants. The test prescribed for joinder of defendants as well as joinder of offenses is whether each of the offenses or defendants is linked together in a common transaction or act.<sup>20</sup>

#### Rule 9. Warrant or Summons Upon Indictment or Information.

This Rule echoes the same general requirements for the issuance of an arrest warrant upon indictment or information as are provided in Rule 4 for the issuance of an arrest warrant upon a complaint. A specific deviation from Rule 4 concerns the summons. Under Rule 9 the issuance of the summons is required by the court upon its own motion or at the request of the prosecuting attorney, while under Rule 4 the issuance of the summons is discretionary with the magistrate.

#### D. ARRAIGNMENT AND PREPARATION FOR TRIAL

This subtitle is concerned with the procedure from the time the magistrate determines that there is probable cause to believe that a crime has been committed by the person charged until the trial. The Rules contained under this subtitle comprise much of the procedure which is considered innovative in the Criminal Rules and a departure from existing North Dakota law.

#### Rule 10. Arraignment.

The purpose of this Rule is simply to inform the accused of the charge against him and to obtain an answer from him so that the issue to be tried can be formulated.

#### Rule 11. Pleas.

This Rule is designed to accomplish a number of objectives not found under existing practice. The Rule incorporates the plea of *nolo contendere* which is pleadable only by leave of the court. Rule 11 also prescribes the advice which the court must give to the defendant to insure that any guilty plea entered is an informed plea. In establishing such a provision, the Rules recognize the propriety of plea discussions and agreements, provided they are disclosed in open court and subject to acceptance or rejection by the trial judge. This provision furthers the proper ends of criminal justice through swift and certain punishment, general deterrence, and the rehabilitation of the defendant. The procedure is designed to prevent abuse of plea discussions and agreements by providing adequate safeguards. The requirements include the participation of the prosecuting and de-

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20. *United States v. Brennan*, 134 F. Supp. 42 (D. Minn. 1955).

fense attorneys, the disclosure of a plea agreement in open court, and permitting the court to reject the plea agreement.

**Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.**

Rule 12 is concerned with pleadings and motions before trial. All objections or defenses raised before trial are made by a simple motion to dismiss or a motion to grant appropriate relief as provided in the Rules.

**Rule 12.1. Notice of Alibi.**

This Rule requires the defendant to give notice if he intends to use the defense of alibi. It is adapted from the proposed amendments to the Federal Rules of Criminal Procedure.<sup>21</sup> The Rule broadens the provisions of Section 29-14-28 of the North Dakota Century Code by requiring the prosecuting attorney to initiate the notice provisions and give notice of any witness he may have to rebut the alibi testimony. Both the prosecuting and defense attorneys have a continuing duty of disclosure.

**Rule 12.2. Notice of Insanity.**

This Rule is new to both North Dakota and federal criminal practice. The Rule, adapted from the proposed amendments to the Federal Rules,<sup>22</sup> requires the defendant to give prior notice of his intention either to rely upon the defense of insanity or to introduce expert testimony of mental disease or defect. The objective of this provision is to give the prosecution time to meet the issue, which will usually require reliance upon expert testimony.

**Rule 13. Trial Together of Indictments or Information.**

This Rule is concerned with consolidating indictments or informations for trial and is directly related to the procedure for the joinder of offenses and defendants. The criteria for permitting such joinder is that the charging documents or defendants are of the same or similar character; that they are based upon the same act or transaction; or that they are based upon two or more acts or transactions connected together or constituting part of a common scheme or plan.

**Rule 14. Relief from Prejudicial Joinder.**

This Rule provides for relief if it appears that either the defendant or the prosecution is prejudiced by a joinder of the offenses or

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21. 52 F.R.D. 409, 432 (1971).

22. *Id.* at 485.

defendants. If the original joinder was improper, Rule 14 confers no discretion. In the event that a severance must be ordered, failure to do so constitutes reversible error.<sup>23</sup>

#### Rule 15. Depositions.

In providing for depositions in criminal actions, Rule 15 continues existing North Dakota law.<sup>24</sup> The function to be served by the criminal deposition is not the discovery of information, but merely the preservation of evidence. It is essential that the party moving for a deposition establish that the prospective witness may be unable to attend a trial or hearing; that the testimony of the witness is material; and that it is necessary to take the deposition in order to prevent a failure of justice.

#### Rule 16. Discovery and Inspection.

Rule 16, providing for discovery and inspection, contains some of the most significant features found in these Rules. Prior to its adoption discovery was entered on an informal basis. The only requirement upon the prosecution was the rule established in *Brady v. Maryland*:

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.<sup>25</sup>

Under Rule 16 two general classifications of materials are discoverable by the defendant. The first class relates to defendants' statements, reports of examinations and tests, or grand jury testimony. Under this classification, the defendant must show that the above-sought items are "relevant." The second class of discoverable material relates to books, papers, documents or tangible objects, and requires a showing of materiality and reasonableness by the defendant. A general motion,<sup>26</sup> substantially in the language of the Rule, is sufficient to place upon the prosecuting attorney the burden of producing the relevant materials of which he has knowledge or could in the course of due diligence obtain knowledge.

Rule 16 broadens the existing Federal Rule by adopting the notion of the proposed amendment to the Federal Rule<sup>27</sup> that permits reciprocal discovery by the prosecution of materials which the defendant intends to produce at the trial. The test for discovery by

23. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 221 (Cipes 2d ed. 1970), citing *Ward v. United States*, 289 F.2d 827, (D.C. Cir. 1961).

24. N.D. CENT. CODE Ch. 31-06 (1960) (Depositions in Criminal Actions).

25. 373 U.S. 83, 87 (1963).

26. *United States v. Lewis*, 266 F. Supp. 897, 898 (S.D.N.Y. 1967).

27. 48 F.R.D. 553, 594 (1970).

the prosecution remains the same as for the defendant in all other respects.

Rule 16 imposes a continuing obligation on a party who has already complied with a discovery order to notify the other party or the court of the existence of additional material.

This provision is tempered by providing that the court may issue a protective order upon a sufficient showing which will deny, restrict, or defer discovery or inspection.

Sanctions for failure to comply with Rule 16 or an order issued pursuant to it include: an order by the court requiring the delinquent party to permit the discovery or inspection of materials not previously disclosed; the granting of a continuance; or the prohibition of the party from introducing that evidentiary material not disclosed.

Rule 16 incorporates the provisions of the Jencks Act<sup>28</sup> in order to protect statements of prosecution witness. A defendant on trial in a criminal prosecution is entitled to relevant and confidential reports and statements in the possession of the prosecution, touching the events and activities to which a prosecution witness has testified at trial, but excluding such matter which is within any valid exclusionary rule.

#### Rule 17. Subpoena.

This Rule conforms substantially to the provisions of Rule 45 of the North Dakota Rules of Civil Procedure with two exceptions: it provides that if a defendant is unable to pay the fees of a necessary witness, the fees will be paid in the same manner that similar fees are paid in the case of prosecution witnesses; and secondly, it provides for service within or without the state as provided by law. The Rule is not limited to subpoena for the trial but may also be issued for a preliminary hearing, grand jury investigation, deposition or for a determination of an issue of fact raised by a pretrial motion.

##### Rule 17.1. Omnibus Hearing and Pretrial Conference.

The Omnibus Hearing is one of the significant developments in these Rules. The procedure is adapted from the ABA Standards Relating to Discovery and Procedure Before Trial<sup>29</sup> and follows the practice now in existence in the Federal District Court for the Western Division of North Dakota. The Omnibus Hearing is intended to serve as an all-purpose hearing, dealing with a wide variety of matters in a greatly simplified and systematic way.

The Omnibus Hearing is designed to accomplish the following

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28. 18 U.S.C. § 3500 (1970) ; Jencks v. United States, 353 U.S. 657 (1957).

29. ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 5 (Approved Draft 1970).

objectives: to bring together at one court appearance as many of the court actions required prior to trial; to utilize a simplified check-list form, insuring that all or a substantial portion of the pretrial procedures and motions are decided at the Hearing to preclude the possibility of subjecting the proceedings to subsequent invalidation; to require that customary claims be raised and considered, insofar as possible, without the preparation and filing of papers which often perform no useful function in the proceedings. Claims which are not asserted at the time of the Hearing will be deemed waived.

The Omnibus Hearing is a voluntary proceeding on the part of both parties. Simply stated, the procedure is as follows: upon a not-guilty plea, the court, with the consent of the parties, sets a time for the Omnibus Hearing. In setting the time, the Court allows sufficient time for informal discovery and investigation by both parties. This first step is characterized by the absence of court supervision. The second step, which is the Omnibus Hearing itself, is under the supervision of the court and is intended to insure that those issues which were not resolved in the first stage are resolved with a minimum of difficulty and delay. Any pretrial motions or other requests requiring judicial attention may be disposed of at the Hearing or on a date set for a further hearing.

The Pretrial Conference aspect of Rule 17.1 is intended primarily as a planning device for trial and should be conducted only in those cases in which there is a reasonable possibility of a trial which is likely to be protracted, otherwise complicated, or when counsel concur in requesting the conference.

#### E. VENUE

This subtitle includes those rules relating to the location of the trial.

#### Rule 18. Place of Trial.

The existing practice is continued in establishing the jurisdiction of trial as the place in which the offense was committed.

#### Rule 19. Transfer Within District.

Rule 19 provides for transfer within the District and is adapted from existing law.<sup>30</sup> The Rule is designed to overcome the binding effect of term time when the term judge is unavailable and the defendant wishes to plead guilty to the criminal charge.

#### Rule 20. Transfer from the County for Plea and Sentence.

30. N.D. CENT. CODE § 29-09-03 (1960) (Prosecution on information without waiting for term of court).

Rule 20 differs from the existing practice in that it permits a defendant charged in one county and held in another to plead guilty in the county in which he was found. This Rule benefits the defendant by permitting a speedy disposition of his case if he desires to plead guilty, without the hardship that generally ensues with a transfer back to the county where the charge originated.

#### Rule 21. Transfer from the County or Municipality for Trial.

This Rule provides another procedural device with which the defendant may change the place of trial. The motion for transfer must allege either that prejudice exists against the defendant, or that it is necessary for the convenience of the parties or witnesses in the interest of justice.

#### Rule 22. Time of Motion to Transfer.

Rule 22 establishes the time for motion to transfer to be at or before entry of the plea, but permits flexibility by allowing the court to set the time for the motion.

### F. TRIAL

This subtitle is concerned with all the aspects of trial procedure, whether by the court or to a jury.

#### Rule 23. Trial by Jury or by Court.

The trial by jury provision of Rule 23 incorporates legislation enacted by the Forty-Third Legislative Assembly in 1973 abolishing the right to jury trial in municipal court cases. The right may be invoked on appeal from the judge of the municipal court on a trial de novo to the district court or county court with increased jurisdiction.<sup>31</sup> Waiver of a jury trial by the defendant is not an absolute right, and the Rule provides that the defendant must have the consent of the prosecuting attorney and the approval of the court before such waiver may be granted. If a jury trial is requested, the jury may consist of less than twelve only with the expressed and intelligent consent of the defendant.<sup>32</sup> The approval of the court and the agreement of the other party are also needed. In a trial to the court, only a general finding of guilty or not guilty is required. This differs from the Federal Rule which requires in addition, if requested, that the court find on the facts specially.

#### Rule 24. Trial Jurors.

This Rule permits both the defense and prosecuting attorneys to

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31. N.D. CENT. CODE § 40-18-15 (Supp. 1973).

32. See explanatory note to N.D. R. CRIM. P. 23.

examine the prospective jurors. Challenges to individual jurors are permitted either peremptorily or for cause. If the challenge is peremptory, the number of challenges varies with the severity of the offense. Fifteen challenges are permitted for murder in the first degree; ten peremptory challenges for other felony offenses; and six peremptory challenges are permitted for offenses other than felonies. A maximum of four alternate jurors may be called and impanelled, and sit with the jury during the trial. Alternate jurors shall be dismissed prior to the retirement of the jury for deliberation of the verdict if they have not been called upon to replace a regular member of the jury.

Rule 24.1. Demand for Change of Trial Judge.

This Rule is preserved in blank for possible future use. Reference is made to specific existing North Dakota law which is in point and may be of some benefit.<sup>33</sup>

Rule 25. Judges; Disability.

Rule 25 permits a new judge to be installed upon the disability of the judge who began the trial. A judge may be replaced by reason of termination of office, death, illness or other disability. If the disability occurs during a jury trial, a successor in office or another judge assigned by the Supreme Court may complete the trial. If the disability occurs after the verdict or finding of guilt, the successor or appointed judge may complete the duties necessary or may grant a new trial if he is satisfied that he cannot perform those duties because he did not preside at the trial. The provisions of this Rule are consistent with existing North Dakota law.

Rule 26. Evidence.

This Rule is very broad and general. It provides that the testimony of witnesses shall be taken only in open court unless otherwise provided by law or in these Rules. The Rule adopts the principles of common law governing the admissibility of evidence and the competency and privileges of witnesses. Finally, the Rule contemplates a uniform body of Rules of Evidence for North Dakota.

Rule 26.1. Foreign Law.

Rule 26.1 establishes a notice requirement of ten days upon a party who intends to introduce the law of a foreign state as an issue in the trial. The Rule differs from the Federal Rule in that the court does not interpret such foreign law but merely takes judicial notice of it.

<sup>33</sup> N.D. CENT. CODE §§ 27-02-05.1, 27-18-04.1, 29-15-20 (Supp. 1973); N.D. CENT. CODE §§ 27-08-38, 40-18-20 (1960).



**Rule 27. Proof of Official Record.**

This Rule incorporates by reference Rule 44 of the North Dakota Rules of Civil Procedure, and provides that proof of an official record or entry thereto may be by any method authorized by law.

**Rule 28. Expert Witnesses and Interpreters.**

Rule 28 provides that the court may exercise its power in the appointment and payment of expert witnesses. This provision is intended to permit the appointment of persons having special knowledge in technical matters to aid the court or jury in an accurate determination of the facts. The provision for interpreters is intended to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel.

**Rule 29. Motion for Judgment of Acquittal.**

Rule 29 provides that a motion for judgment of acquittal may be made before the case goes to the jury even though it was not made at the close of the evidence. The motion may also be made if the jury is discharged without having returned a verdict. Such motion must be made within 7 days after the jury is discharged or the court may, within the 7-day period, extend the time limit.

**Rule 30. Instructions.**

Rule 30 is identical to Rule 51 of the North Dakota Rules of Civil Procedure, as amended and effective August 1, 1971, with the exception of subdivision (d), which was added to give optional effect of this Rule to county justice and municipal courts which are presided over by persons learned in the law.

**Rule 31. Verdict.**

This Rule requires that the verdict be unanimous and returned to the judge in open court.<sup>34</sup> The jury may be polled to determine if the verdict is unanimous. The Rule further provides that if in the case of multiple defendants or multiple charges, the jury does not reach agreement on all charges, those matters upon which it does not agree may be retried. A conviction for a lesser offense necessarily included in the offense charged is allowed. The final provision of the Rule providing for special verdicts has no federal counterpart and was added as a tool in determining factual issues. A determination of the factual issues in specific instances is deemed to be within the province of the jury.

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34. *But see* *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

### G. JUDGMENT

This subtitle includes those Rules relating to the actual sentencing process.

#### Rule 32. Sentence and Judgment.

Rule 32 incorporates several aspects of the judgment concept. It provides for imposition of sentence and requires that the imposition be without unreasonable delay. The defendant is afforded the right of allocution, to present extenuating or mitigating circumstances relative to sentence. The prosecution is also afforded an opportunity to speak on any matter material to the imposition of sentence.

The court, subsequent to imposition of sentence, is required to inform the defendant in a case which has been tried pursuant to a not-guilty plea of his right to appeal. If he is indigent the defendant has the right of appointed counsel on appeal.

The Rule also provides that the court may order a presentence investigation. Such an investigation is to be made available to the court only after a plea or finding of guilt, except in the case of a determination of acceptance of a plea agreement. Caution should be exercised in this instance if there is any likelihood that a plea agreement will be rejected since the judge will probably prejudice himself and thereby be precluded from trying the case.

The Rule permits the withdrawal of a guilty plea any time before sentence is imposed unless it is to correct a manifest injustice. In that case a guilty plea may be withdrawn after sentence is imposed.

The Rule also concerns itself with probation and incorporates by reference the provisions of law recognizing probation as a valid post-conviction disposition.

The final portion of Rule 32 is concerned with the procedure for revocation of probation and incorporates the recommended procedures of the American Bar Association Standards<sup>35</sup> in protecting the fundamental rights of the probationer. Generally the sentencing court in a probation situation retains jurisdiction over the probationer.<sup>36</sup> A determination concerning probation violation will be made only after a hearing in open court at which the probationer has the right to be present and with counsel. If the alleged violation is contested, the burden of proof upon the prosecution is by a preponderance of the evidence.

#### Rule 33. New Trial.

35. ABA Standards Relating to Probation (Approved Draft, 1970).

36. *But see* N.D. CENT. CODE § 12-53-06 (Supp. 1973) (When sentence for felony suspended court must place defendant on probation).

Rule 33 differs from existing North Dakota law in several aspects. The only requirement under the Rule for a motion for a new trial is that it be "in the interest of justice," whereas Section 29-24-02 of the North Dakota Century Code delineates the causes for granting a new trial. The Rule also sets a limit of two years after a final judgment for a motion for a new trial on the grounds of newly discovered evidence, and within 30 days after the discovery of the evidence. The time within which the motion must be made is changed from "before the time for an appeal has elapsed"<sup>37</sup> to "within seven days after verdict or finding of guilt. . . ."

#### Rule 34. Arrest of Judgment.

This Rule allows the court which rendered judgment to correct Rule there are only two grounds for arrest of judgment: if the indictment, information, or complaint does not charge an offense; or if the court was without jurisdiction over the offense charged. Section 29-25-02 of the North Dakota Century Code provides six grounds for arrest of judgment, and allows the court to arrest the judgment without a motion if it finds any of the listed defects.<sup>38</sup> Rule 34 specifically states that the court may act only on a motion from a defendant. The seven-day time limit which is set in the Rule for the making of the motion begins to run after a verdict or finding of guilt, or after a plea of guilty or nolo contendere.

#### Rule 35. Correction or Reduction of Sentence.

This Rule allows the court which renders judgment to correct an illegal sentence or sentence imposed in an illegal manner and to reduce a sentence. The court may take this action on its own motion. This Rule sets a time limit of 120 days after sentence is imposed, or after receipt of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding, a judgment of conviction.

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37. N.D. CENT. CODE § 29-24-06 (1960).

38. A judgment shall be arrested on the grounds:

1. That the court has no jurisdiction of the offense charged in the information or indictment;
2. That the grand jury, if the trial was had upon an indictment, had no authority to inquire into the offense charged because it was not within the jurisdiction of the county;
3. That the information or indictment does not conform substantially to the requirements of the title;
4. That more than one offense is charged in the information or indictment;
5. That the facts stated in the information or indictment do not constitute a public offense;
6. That the information or indictment contains matter which, if true, would constitute a legal justification of or excuse for the offense charged or other legal bar to prosecution.

**Rule 36. Clerical Mistakes.**

Rule 36 simply allows correction of clerical mistakes arising from oversight or omission.

**H. APPEAL**

This subtitle deals with the procedure involved in the appeal process and the status of the sentence pending appeal.

**Rule 37. Appeals as of Right to District Court or County Court With Increased Jurisdiction; How Taken.**

Rule 37 contains the bulk of the material on appeal. This Rule is patterned after Rules 3 and 4 of the North Dakota Rules of Appellate Procedure which were promulgated by the Supreme Court of North Dakota in March, 1973. Wherever possible, this Rule coincides with the Appellate Rules so as to avoid confusion. It applies to appeals to the District Courts and the County Courts With Increased Jurisdiction, whereas the Appellate Rules apply only to appeals to the Supreme Court. In the new Rules, the clerk of the trial court serves notice of the appeal on the defendant and the prosecutor, rather than having the attorney serve the notice on the parties as was done under the old procedure. The time for taking an appeal has been reduced to 10 days after the entry of the judgment or order appealed from to make the administration of justice more efficient. The notice of appeal must still be filed with the clerk of the trial court to perfect the appeal. The designation of parties on appeal has also been changed from appellant and respondent, to appellant and appellee, but the title of the action will not be changed.

**Rule 38. Stay of Execution and Relief Pending Review.**

This is generally the same as the other North Dakota law and allows for a stay of execution of a sentence while an appeal is pending.

**I. SUPPLEMENTARY AND SPECIAL PROCEEDINGS**

This subtitle deals with the proceedings involved in search and seizure and criminal contempt.

**Rule 41. Search and Seizure.**

Rule 41 is similar to the former North Dakota law. The property which may be seized under this Rule takes on a different description but is basically the same as the former law. Terms such as property and daytime are also defined. The new Rule requires that before a warrant may issue the grounds must be established either by sworn affidavits or testimony taken by the magistrate and re-

corded either by a court reporter or by recording equipment. This provides a record of what was used to establish probable cause in case of a motion to suppress.

#### Rule 42. Criminal Contempt.

This Rule follows former North Dakota law in its summary proceedings but has a few additions in its disposition upon notice and hearing. Rule 42 (b) specifies that the defendant charged with criminal contempt is entitled to a trial by jury, release from custody and a trial by a different judge if the contempt involves disrespect to the original trial judge.

### J. GENERAL PROVISIONS

This subtitle contains the remainder of the Rules. The subjects are varied and deal with material ranging from the right to counsel to calendars.

#### Rule 43. Presence of the Defendant.

This Rule incorporates statute and case law in requiring the presence of the defendant at the arraignment, the time of the plea, and all stages of the trial. The defendant is allowed to be voluntarily absent after the trial has commenced in felony cases, and to give his written consent to the arraignment, plea, trial, and imposition of sentence in his absence in misdemeanor cases.

#### Rule 44. Right to and Assignment of Counsel.

Rule 44 incorporates the holding of the United States Supreme Court in *Argersinger v. Hamlin*.<sup>39</sup> This Rule provides for the appointment of counsel at all stages of criminal prosecution for indigent defendants, unless the magistrate has determined that the punishment upon conviction will not include imprisonment.

#### Rule 45. Time.

This Rule basically follows existing state law and the North Dakota Rules of Civil Procedure in order to avoid confusion.

#### Rule 46. Release from Custody.

This Rule represents one of the most significant aspects of these Rules. The Rule is adapted from Rule 46 of the Federal Rules of Criminal Procedure, and includes the provisions of the Bail Reform Act.<sup>40</sup> The Rule is intended to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall

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39. 407 U.S. 25 (1972).

40. 18 U.S.C. § 3145 (1970).

not needlessly be detained pending their appearances when detention serves neither the ends of justice nor the public interest. Under the Rule, emphasis on money bail as a means of securing defendant's appearance has been replaced by emphasis on non-pecuniary conditions for pre-trial release. The element of financial resources, however, has not been discarded as a factor in determining bail. A person held for a non-capital offense may be released upon his own recognizance or upon the execution of an unsecured appearance bond. If the magistrate determines that release will not reasonably assure the appearance of the accused, he may impose one or more of the specified conditions. In capital cases, the magistrate may order the accused detained. If the order of detention or conditional release is made by a magistrate other than the magistrate of the trial court, an appeal for an amendment of such order may be made to the trial court magistrate.

Under the Rule, the defendant may continue his release during the trial unless the court deems that the conduct of the defendant will disrupt the orderly and expeditious progress of the trial. Upon conviction and notice of appeal, the defendant may be released from custody by the trial court. If the trial court refuses to grant release or imposes conditions of release, a motion for release or for modification of the conditions of release may be made to the Supreme Court or a judge thereof. The trial judge who refuses release pending appeal or who imposes conditions of release must state in writing the reasons for the action taken. A person held as a material witness must be afforded the same conditions of release afforded an accused; however, release may be delayed long enough to take a deposition of the witness.

A forfeiture shall be declared for breach of the conditions of bond, but may be set aside if it appears that justice does not require its enforcement.

#### Rule 47. Motions.

Rule 47 is the same as North Dakota Civil Rule 7(b) with two exceptions: (1) it does not require that the grounds for the motion be stated "with particularity;" and (2) the use of affidavits in support of a motion is permissible. This Rule requires that all motions not made during a hearing or trial be in writing.

#### Rule 48. Dismissal.

This Rule is concerned with dismissal either by the court or the prosecuting attorney. The requirement of the court's consent is designed "to prevent harassment of a defendant by charging, dismissing and recharging without placing a defendant in jeopardy."<sup>41</sup>

41. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

**Rule 49. Service and Filing of Papers.**

Rule 49 is substantially the same as Rule 5 of the North Dakota Civil Rules, and states in most of its subdivisions that the papers shall be served or filed in the manner provided in the above Civil Rule.

**Rule 50. Calendars.**

This Rule deals with calendars and directs that the criminal actions be given preference as far as practicable.

**Rule 51. Exceptions Unnecessary.**

Rule 51 states that "exceptions to rulings or orders of the court are unnecessary." This Rule eliminates all but the objection to preserve an appeal.

**Rule 52. Harmless Error and Obvious Error.**

Subdivision (a), Harmless Error, is the same as pre-existing North Dakota law, providing that any error not affecting substantial rights be disregarded.<sup>42</sup>

Subdivision (b), Obvious Error, is an addition to North Dakota law and allows errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the court.

**Rule 53. Regulation of Conduct in the Courtroom.**

This Rule is adapted from the Rule VII(d) of the Rules of Court for the District Courts. Cameras, sound recorders, or other such devices, except those operated for official purposes, are prohibited.<sup>43</sup>

**Rule 54. Application and Exception.**

Subdivision (a) of this Rule provides that "these Rules govern the practice and procedure in all criminal proceedings in the courts of this state as prescribed in Rule 1."

Subdivision (b) lists those proceedings to which the Rules do not apply. These include: application for a writ of habeas corpus; peace bonds; mental health board and tuberculosis board proceedings; extradition and rendition of fugitives; forfeiture of property for violation of a statute of this state; the collection of fines and penalties; proceedings under the Uniform Juvenile Court Act;<sup>44</sup> an action to determine paternity of a child born out of wedlock.<sup>45</sup>

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42. N.D. CENT. CODE § 29-28-20 (1960).

43. This rule is in keeping with *Estes v. Texas*, 381 U.S. 532 (1965), *rehearing denied*, 382 U.S. 875 (1965).

44. N.D. CENT. CODE Ch. 27-20 (Supp. 1973).

45. N.D. CENT. CODE §§ 32-36-08 to -16 (1960).

**Rule 55. Records.**

Rule 55 places the responsibility of keeping the records of the court with the clerk. Recognizing that many of the lower courts are without the assistance of a clerk, the Magistrate has the responsibility for keeping the records in those cases.

**Rule 56. Courts Always Open.**

Rule 56 is similar to Rule 77(a) of the North Dakota Rules of Civil Procedure, and Rule 45(a) of the North Dakota Rules of Appellate Procedure. This Rule provides that the courts "shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process, and of making motions and orders."

**Rule 57. Practice When Procedure Not Specified.**

Rule 57 is adapted from the language of Rule 83 of the North Dakota Rules of Civil Procedure, and gives latitude to each judge to establish procedure in his court which is not otherwise prescribed by Rule or statute. This Rule is not to be construed to detract in any manner from the authority of the Supreme Court under Chapter 27-02 of the North Dakota Century Code.

**Rule 58. Appendix of Forms.**

This Rule merely points out the existence of a set of forms and that their use is not mandatory. They are meant to be illustrative guides and nothing more. Included in this Appendix is a form for the Omnibus Hearing—Form 13.

**Rule 59. Effective Date; Statutes Superseded.**

Rule 59 sets the effective date and provides that all statutes or parts of statutes in conflict with these rules, and the statutes listed as superseded in Table of Statutes Affected are superseded.

**CONCLUSION**

The adoption of the North Dakota Rules of Criminal Procedure represent a major step forward in the State's criminal justice system. The Rules provide new and innovative procedures and brings North Dakota's criminal procedure closely in line with federal procedure as well as that of many other states. In addition, the Rules update and consolidate existing North Dakota procedure which previously was scattered throughout the North Dakota Century Code. As provided in Rule 2, the objective and purpose of the Rules is to provide for the just determination of every criminal proceeding with a minimum of expense and delay and insofar as practical, to provide simplicity in procedure and fairness in administration with an



ultimate objective that seeks the truth of the issue while guarding the constitutionally protected rights of the accused.

Our criminal justice system is dependent upon constitutional interpretations of guaranteed rights of the people, and the Rules of Criminal Procedure represent a significant portion of that system. It is also subject to the dynamic forces of change that move with the needs of the people and the times. Therefore, certain extrinsic forces will determine that amendments will be necessary from time to time. Another important consideration is that the Rules apply to all North Dakota courts, and as such, certain adjustments will be necessary to insure that the theoretically sound product is sound in practice. It is therefore incumbent upon the Supreme Court to provide for an ongoing committee, charged with the responsibility of periodic review of the Rules for the purpose of recommending necessary modifications. Only in this way will the North Dakota Rules of Criminal Procedure remain as a current and realistic expression of due process in the State of North Dakota.

In view of the fact that this article was drafted prior to the final hearing of the Supreme Court on the Rules of Criminal Procedure on July 24, 1973, some minor style changes will be noted as well as the substantive change which eliminates the *nolo contendere* plea (see Rules 11 and 12).

This article is dedicated to the memory of the late Chief Justice Alvin C. Strutz.